United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7518

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7518

SOUNION SHIPPING INC., et al.,

Plaintiffs-Appellees,

- against -

PARCEL TANKERS, INC., et al.,

Defendant-Appellant.

APPELLEES BRIEF

BURLINGHAM UNDERWOOD & LORD
One Battery Park Plaza
New York, New York 10004
(212) 422 - 7585

- and -

FREEHILL, HOGAN & MAHAR
21 West Street
New York, New York 10006
(212) 425 - 1900

Attorneys for Appellees

ROBERT J. ZAPF,
JOSEPH C. SMITH,
PHILIP V. MOYLES,
Of Counsel

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PRELIMINARY STATEMENT

The District Court did not err in entering the order of judgment confirming the arbitration award without staying execution of that award. The action herein was commenced under, and is governed by, Title 9 United States Code, the federal arbitration statutes. The Federal Rules of Civil Procedure do not government arbitration proceedings and have limited applicability to actions commenced under Title 9 United States Code, applying only where they may be in aid of the arbitration procedure.

Under the facts of this case, entry of an order staying execution of the order of judgment confirming the arbitration award as requested by charterers would effectively nullify the arbitration award, and would constitute vacation, modification or correction of that award contrary to the provisions of 9 U.S.C. §§ 10, 11 and 12.

STATEMENT OF ISSUES

1) Does Rule 54(b) of the Federal Rules of Civil Procedure govern the entry by the District Court of an order of judgment confirming an arbitration award pursuant to 9 U.S.C. §§ 9 and 13 when there are no other claims pending for determination by the District Court, and where the parties have expressly agreed that judgment may be entered upon any award made by the arbitrators?

2) Did the District Court err in entering its order of judgment confirming the arbitration award under 9 U.S.C. §§ 9 and 13 without staying enforcement of the judgment?

3) Is owner entitled to have damages and double costs assessed against charterer under 28 U.S.C. § 1912 and Rule 38 of the Fed l Rules of Appellate Procedure for pursuing a dilatory, frivolous appeal?

STATEMENT OF FACTS

This action was commenced on August 19, 1976 by Sounion Shipping, Inc., the owner of the M.T. STOLT ARGOBAY, and by Armco Financial Corporation AG, the mortgagee of the ship, against Parcel Tankers, Inc., the time charterer of the ship, to recover charter hire unjustifiably withheld by charterer since July 23, 1976 in breach of the charter party and for indemnification for claims made against the ship and owner by cargo receivers for cargo contaminations caused by the misrepresentation and breach of the charter party by charterer. A complaint was filed pursuant to 9 U.S.C. § 8 in order to obtain security for any arbitration award made in plaintiffs favor (A-13 to A-15). The court was requested, as specifically provided in 9 U.S.C. § 8, to retain jurisdiction to enter judgment on the award (A-17). The arbitration clause herein involved provides in relevant part:

> "judgment may be entered upon <u>any</u> award made hereunder in any court having jurisdiction in the premises." (A-37, lines 519-520 emphasis added.)

Arbitration of all disputes was duly commenced by the parties on Tuesday, September 14, 1976. After the presentation of evidence by both parties, owner requested the arbitration panel to make an Interirm Arbitration Decision and Award, that the charterer was not justified in withholding hire,

and to order the charterer to pay the hire withheld.

After considering the evidence submitted and argument of counsel for both parties, on September 16, 1976, the panel unanimously decided in favor of owner and issued the Interim Arbitration Decision (A-80) which states in relevant part:

> ". . . the Charterer is not justified in withholding hire as due and required under Clause 5.
>
> The Panel directs that full charter hire be paid to the Owner to date in accordance with the terms of the Charter." (A-81)

After this award was rendered by the panel, charterer filed an answer to the complaint, and counter-claims, (although charterer was already in default in answering the complaint), including among them a claim based upon the order of the panel directing charterer to pay hire, and asserting as damages under this claim the amount of hire accrued as of that date, which charterer had been directed to pay (A-27, paragraphs 31-36 of the answer). Charterer simultaneously had the District Court issue an Order to Show Cause, seeking counter-security from the plaintiffs for the amounts asserted as damages in charterer's counter-claims (A-58).

Owner opposed the request for counter security and moved the District Court to enter an order of judgment confirming the arbitration award pursuant to 9 U.S.C. §§ 9 and 13, and the express agreement between the parties that judgment may

be entered upon any award made under the arbitration clause in the charter party (A-37, lines 519-520). Conferences were held in the District Court on both the order to show cause and the motion for entry of an order of judgment on September 24, 1976 and September 28, 1976, but no transcript was made of the arguments put forth by counsel.

After the first conference was adjourned, the parties returned to the arbitration proceeding where charterer told the panel that the parties had been directed by the District Court to apply to the panel to ascertain whether the arbitrators would consider imposing any conditions upon payment of the hire charterer had been directed to make. The panel reluctantly issued an opinion by a 2-1 vote (A-103) which was presented to the District Court prior to the second conference. The District Court had not asked for any assistance from the panel, had not directed the parties to apply to the panel and had not directed the panel to do anything. The spilt opinion rendered by the panel was not an award and was never intended to be an award.

At no time did charterer move the District Court to vacate, modify or correct the arbitration award, or present any argument or grounds for doing so, as required by 9 U.S.C. §§ 10, 11 and 12. Nor did charterer argue that the order confirming the award should not be entered on any of the grounds set forth in those statutes. Charterer contented itself with

its motion for counter-security, and a request, based upon the Federal Rules of Civil Procedure, that the order of judgment confirming the award not be entered or if so, that a stay of execution of the order of judgment be entered. This argument was later repeated in charterer's counsel's letter to the District Court dated September 29, 1976 (A-131).

The District Court issued a Memorandum Decision (A-5) denying charterer's motion for counter-security, and entering the order of judgment requested by owner, pursuant to 9 U.S.C. § 9, declining to direct any stay of execution as requested by charterer.

Charterer filed its Notice of Appeal on October 15, 1976. Believing this appeal to be frivolous with no support in law or facts and in essence based upon non-appealable grounds, owner moved this Court to dismiss the appeal or in the alternative to summarily affirm the District Court. Argument was held before Judges Moore, Feinberg and Meskill on November 3, 1976 at which time the Court referred the matter to the panel which would hear the appeal, ordered an accelerated briefing schedule, and set the case for argument during the week of November 29, 1976.

Argument

I. THE FEDERAL RULES OF CIVIL PROCEDURE, RULES 54(b) AND 62(h) ARE NOT APPLICABLE TO THIS PROCEEDING UNDER 9 U.S.C. §§ 9 AND 13 FOR AN ORDER CONFIRMING AN ARBITRATION AWARD.

Under the express terms of the written agreement between the parties "Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration . . ." (A-37, lines 496-497) and "judgment may be entered upon any award made hereunder in any Court having jurisdiction in the premises." (A-37, lines 519-520, emphasis added). Owner commenced this action under 9 U.S.C. § 8 "for the purpose of obtaining partial security for any award which may ultimately be entered in plaintiffs' favor" (A-14, par. 19). This is a permissible method of commencing an arbitration of disputes between the parties, Marine Transit Co. v. Dreyfus, 284 U.S. 263 (1932), and after filing of the complaint, arbitration proceedings were commenced and hearings were held before a duly constituted panel of arbitrators. The District Court was requested to retain jurisdiction, as specifically provided in 9 U.S.C. § 8, solely for the purpose of entering its decree upon the arbitration award (A-17). The District Court was not intended to, nor did it, decide any of the issues going to the merits of the claims between the parties.

The District Court did not have multiple claims before it -- the panel of arbitrators did. Rule 54(b) is applicable only "When more than one claim for relief is presented in an action . . .", not when more than one claim for relief is presented to an arbitration panel. It is well settled that the Federal Rules of Civil Procedure do not apply to arbitration proceedings. Parsons & Wh. Ov. Co., Inc. v. Societe G. De L. Du P. (R.), 508 F.2d 969, 975 (2 Cir. 1974); Washington-Baltimore N.G., Loc. 35 v. Washington Post Co., 143 U.S. App. D.C. 210, 442 F.2d 1234, 1238-1239 (1971); Commercial Solvents Corp. v. Louisiana Liquid F. Co., 20 F.R.D. 359 (S.D.N.Y. 1957); Foremost Yarn Mills, Inc. v. Rose Mills, Inc., 25 F.R.D. 9 (E.D. Pa. 1960); Great Scott Supermarkets, Inc. v. Local U. No. 337, Teamsters, 363 F. Supp. 1351 (E.D. Mich. 1973). Indeed, Rule 1 of the Federal Rules of Civil Procedure explicitly provides, in relevant part:

> "These rules govern the procedure in the United States district courts . . . with the exceptions stated in Rule 81." (emphasis added).

None of the exceptions stated in Rule 81 apply these rules to the proceedings before an arbitration panel. With reference to Rule 81(a)(3) and arbitration proceedings, the Court in Great Scott Supermarkets, Inc. v. Local U. No. 337, Teamsters, supra, stated:

> "However, this section applies to proceedings in the courts." 363 F. Supp. at 1354, emphasis added.

The Court in Foremost Yarn Mills, Inc. v. Rose Mills, Inc., supra, stated:

> "It would appear that plaintiff misapprehends the effect of Rule 81(a)(3). The Rule relates solely to proceedings under Tile 9 U.S.C.A. §§ 1 to 14 inclusive . . . The latter proceedings are limited in scope and have nothing to do with the merits of the real controversy." 25 F.R.D. at 11 (emphasis added).

Charterer did not file its answer and counterclaims until after the arbitration panel had rendered its Interim Decision on September 16, 1976 (A-2, Docket Entry No. 11 dated September 21, 1976; A-22). Such an action was entirely unnecessary, as charterer admits that "all claims were submitted to arbitration" (Appellant's Brief, p. 13) and that the arbitration of disputes continued after the Interim Decision, with hearings extending over the period from September 14 to October 15, 1976 (Appellant's Brief, pp. 6-7). There was never any intention that the District Court decide any issues going to the merits, and no claims on such issues were ever presented to the District Court for determination. If the District Court had considered any issues going to the merits of the case, either party could have obtained a stay of such proceedings under 9 U.S.C. § 3. The District Court retained jurisdiction

over the matter solely "to enter its decree upon the award" under 9 U.S.C. § 8. The only claim ever presented to the District Court for determination, and the subject of this appeal, was a request by the owner for an order pursuant to 9 U.S.C. §§ 9 and 13 confirming the Interim Decision of the arbitrators. As only one claim was presented, Rules 54(b) and 62(h) of the Federal Rules of Civil Procedure are inapplicable.

The charterer is really asking this Court to apply the Federal Rules of Civil Procedure to arbitration proceedings. The arbitrators unanimously decided owner's claim for charter hire in owner's favor, and entered the Interim Decision on that claim, stating:

> "This decision in no way prejudices any claim either party may present to the Panel for final consideration and award in these proceedings." (A-81).

Thus the panel left for consideration any other claims the parties cared to submit. As stated above, charterer admits that other claims were presented to the panel and are being considered (Appellant's Brief, pp. 6-7, 13). Charterer seeks to stay enforcement of the award under Rules 54(b) and 62(h) pending determination of the other claims presented to the panel. In Parsons & Wh. Ov. Co., Inc. v. Societe G. De L. Du P. (R.), 508 F.2d 969 (2 Cir. 1974) this Court held that:

> "By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights . . . in favor of arbitration 'with all of its well known advantages and drawbacks.' Washington - Baltimore Newspaper Guild, Local 35 v. The Washington Post Co., 143 U.S. App. D.C. 210, 442 F.2d 1234, 1238 (1971) . . ." (p. 975)

As stated by the District Court in Commercial Solvents Corp. v. Louisiana Liquid F. Co., supra:

> "By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations. . . . Arbitration may well have advantages but where the converse results a party having chosen to arbitrate cannot then vacillate and successfully urge a preference for a unique combination of litigation and arbitration." 20 F.R.D. at 361.

Having chosen to arbitrate all disputes, charterer cannot now avail itself of the procedures applicable to determination of disputes under the Federal Rules of Civil Procedure.

While the Federal Rules have been applied to proceedings under Title 9 United States Code, such application is solely for the purpose of aiding the arbitration proceeding. See, e.g., Compania Espanola de Pet., S.A. v. Nereus Ship, 527 F.2d 966 (2 Cir. 1975) cert. denied, ____ U.S. ____, 44 U.S. Law Week 3719 (1976); Bigge Crane and Rigging Co. v. Docutel Corporation, 371 F. Supp. 240 (E.D.N.Y. 1973); International U. of E., R. & M. W. v. Westinghouse Elec. Corp., 48 F.R.D. 298 (S.D.N.Y. 1969);

Mississippi Power Company v. Peabody Coal Company, 69 F.R.D. 558 (S.D. Miss. 1976); Vespe Contracting Co. v. Anvan Corporation, 399 F. Supp. 516 (E.D. Pa. 1975); Ferro Union Corporation v. S.S. Ionic Coast, 43 F.R.D. 11 (S.D. Texas 1967); Robinson v. Warner, 370 F. Supp. 828 (D.R.I. 1974). The Federal Rules of Civil Procedure have never been applied to frustrate, vacate, modify or correct an arbitration award. In Bridgeport Rolling Mills Company v. Brown, 314 F.2d 885 (2 Cir. 1963), cert. denied 375 U.S. 821 (1963), this Court in refusing to vacate an arbitration award on the grounds of newly discovered evidence under Rule 60(b), stated:

> "We only hold that the parties, having agreed to an arbitration of their differences, are bound by the arbitration award made upon the testimony before the arbitrator." (p. 886)

See also, Washington Baltimore N.G. Loc. 35 v. Washington Post Co., 143 U.S. App. D.C. 210, 442 F.2d 1234 (1971). The only grounds upon which an arbitration award can be vacated, modified or corrected are found in 9 U.S.C. §§ 10 and 11. This Court in Office of Sup., Gov. of Rep. of Korea v. New York Nav. Co., Inc., 469 F.2d 377 (2 Cir. 1972) said:

> "Turning to the merits it is settled that upon judicial review of an arbitrators' (sic) award 'the court's function in . . . vacating an arbitration award is severely limited', Amicizia Societa Nav. v. Chilean Nitrate & Iodine S. Corp., 274 F.2d 805, 808 (2d Cir.) cert. denied, 363 U.S. 843, 80 S. Ct. 1612, 4 L. Ed. 2d 1727 (1960),

> being confined to determining whether or not one of the grounds specified by 9 U.S.C. § 10 for vacation of an award exists . . . Judicial review has been thus restricted in order to further the objective of arbitration, which is to enable parties to resolve disputes promptly and inexpensively, without resort to litigation. . ." (p. 379).

Charterer never presented the District Court with any argument, exhibits or testimony seeking to establish any grounds required under 9 U.S.C. §§ 10 and 11 for vacating, modifying or correcting the arbitration award. The split opinion rendered by the panel was not an award, and was not intended to be an award. The District Court properly took no cognizance of that opinion. Therefore, under the express direction of 9 U.S.C. § 9, the District Court was <u>required</u> to enter its order confirming the arbitration award. 9 U.S.C. § 9 provides, in relevant part:

> ". . . any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court <u>must grant such an order</u> unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title . . . " (emphasis added).

The arbitration award landed down by the panel stated in relevant part:

> ". . . the Charterer is not justified in withholding hire as due and required under Clause 5.

> The Panel directs that full charter hire be paid to the Owner to date in accordance with the terms of the Charter." (A-81)

After the presentation of evidence and argument by counsel for both parties, the panel directed charterer to pay full charter hire which had been unjustifiably withheld since July 23, 1976 (A-80). If the District Court had the power to stay enforcement of that award under the provisions of the Federal Rules of Civil Procedure, it would be effectively nullifying the decision of the panel on the merits, on grounds other than those required by Congress in 9 U.S.C. §§ 10 and 11, creating a direct conflict between the Rules and the arbitration statutes, Title 9 United States Code. The Rules of Federal Civil Procedure were never intended to operate in this fashion. The Court in Penn Tanker Co. of Delaware v. C.H.Z. Rolimpex, Warszawa, 199 F. Supp. 716 (S.D.N.Y. 1961) stated:

> "An argument could be made that the Federal Rules should be applied to proceedings under Title 9 to the extent to which they are mutually consistent." (p. 718, emphasis added).

See also, 7 Moore's Federal Practice, § 81.05 [7], pp. 81-82, 81-83 (Second Edition 1975). Where the Federal Rules of Civil Procedure are inconsistent with the provisions of Title 9 United States Code, the Rules are inapplicable. A declaration that the District Court has the power under the Federal Rules

to stay enforcement of this arbitration award dependent upon some future contingency would frustrate the purpose of arbitration proceedings to which the parties have agreed to submit for a just and speedy determination of disputes by non-judicial means, and would bring into this process of settlement of disputes the technical rules of litigation which arbitration was intended to avoid.

II. THE DISTRICT COURT DID NOT ERR IN ENTERING ITS ORDER CONFIRMING THE ARBITRATION AWARD HEREIN WITHOUT STAYING EXECUTION OF THAT ORDER.

Charterer is essentially asking the Courts to exercise a discretionary, equitable power to prevent owner from enforcing the arbitration award. Charterer is in no position to ask the Courts to exercise their equity powers.

It is admitted that owner faces financial difficulties (Affidavit In Support Of Motion To Dismiss Appeal). However, these financial difficulties are the direct result of the wrongful and unjustified withholding of charter hire by the charterer, placing owner at the mercy of the mortagee. In addition, charterer has refused to allow owner to trade the vessel in any attempt to mitigate damages for either party, and the vessel has been sitting in Rotterdam since July 23, 1976. This fact was brought to the attention of the District Court in the course of the

proceedings below.

The panel of arbitrators unanimously ruled:

". . . The Charterer is not justified in withholding hire as due and required under Clause 5." (A-81).

This is a decision on the merits of owner's claim, reached after the presentation of evidence and argument of counsel for both parties. Despite this ruling on the merits, and the panel's order directing charterer to pay hire, the charterer has continued in its course of conduct of refusing to pay charter hire, thereby continuing and aggravating the economic squeeze on the owner. At the time of the arbitration award, a total of $225,513.89 was due the owner, a net sum, giving charterer the benefit of a claim for owner's expenses charterer had paid, and including interest at the rate of 6% per annum calculated to September 23, 1976 (A-129 to A-130). Since the time of the award charterer has refused to pay and has withheld charter hire in the additional amount of $291,017.50. Charterer has thus far retained a total of $516,531.39 by its refusal to adhere to is contractual agreements and the award of a duly constituted arbitration panel.

Charterer has argued that it was faced with a "dilemma" (Appellant's Brief, p. 3) and a "problem" (Appellant's Brief, p. 15) because the charterhire had been assigned to the Mortgagee under a contract whereby charterer has no recourse against the

mortgagee for claims against the owner (A-51 to A-52). Charterer specifically agreed to this contractual arrangement (A-45, Cl. 82). There would be no dilemma or problem facing charterer in this regard if it had not wrongfully withheld the payments it had agreed to make. Having done so, charterer now seeks to have the Courts give their sanction to its course of conduct, in the face of a determination by the arbitration panel that this conduct was not justified, and requests the court to allow charterer to retain these funds, for the admitted purpose of providing charterer security for its claims against owner which security the District Court denied (Appellant's Brief, pp. 17-20; A-7 to A-9). It is submitted that charterer does not qualify as a beneficiary of the equity powers of this or any Court, and that this was recognized by the District Court below.

This request of charterer must be reviewed in the light of the District Court's denial of charter's request for security for its claims against owner (A-7 to A-9). The District Court in denying this request stated:

> "The court must also take note of the respect due the Interim Decision, voted by a unanimous panel of arbitrators, which found that the defendant had improperly withheld payment of charter hire and directed that full hire be paid by Parcel Tankers in accordance with the terms and conditions of the charter party agreement." (A-9).

If the District Court were to stay enforcement of the arbitration award, it would be providing the very security to which it had ruled charterer was not entitled. It cannot be said, therefore, that the District Court did not exercise its discretion in this matter, and there can be no abuse of discretion by the District Court in denying the security charterer requested, either by entering its order confirming the award without staying enforcement of that award, or otherwise.

III. THIS APPEAL IS WHOLLY FRIVOLOUS, WITHOUT JUSTIFICATION IN LAW OR FACT, AND IS MADE SOLELY FOR THE PURPOSE OF DELAYING ENFORCEMENT OF THE AWARD.

It is clear and obvious that charterer is really appealing from the denial of security for its claims. A stay of enforcement of the arbitration award would provide the security charterer seeks, despite the ruling of the District Court that charterer was not entitled to such security.

It is equally clear and obvious that a decision denying security is non-appealable. Donlon Industries, Inc. v. Forte, 402 F.2d 935 (2 Cir. 1968); Klein v. Adams & Peck, 436 F.2d 337 (2 Cir. 1971). Charterer has admitted that this decision is non-appealable (appellant's Brief, p. 17). The sole purpose of this appeal is to frustrate and delay enforcement of the arbitration award.

In light of this, we ask this Court to award owner damages in the amount of 25% of the judgment entered by the District Court and double costs as a penalty against charterer for pursuing this frivolous appeal. 28 U.S.C.A. § 1912; Federal Rules of Appellate Procedure, Rule 38, 28 U.S.C.A.; South East Atlantic Shipping Ltd. v. Garnac Grain Company, 356 F.2d 189, 192-193 (2 Cir. 1966); cf., Oscar Gruss & Son v. Lumbermens Mutual Casualty Co., 422 F.2d 1278, 1283-1284 (2 Cir. 1970).

CONCLUSION

This Court should affirm the order of the District Court and assess damages and double costs against the charterer for pursuing this frivolous appeal.

Dated: New York, New York
November 22, 1976

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD
One Battery Park Plaza
New York, New York 10004
(212) 422 - 7585

- and -

FREEHILL, HOGAN & MAHAR
21 West Street
New York, New York 10006
(212) 425 - 1900

Attorneys for Appellees

ROBERT J. ZAPF,
JOSEPH C. SMITH,
PHILIP V. MOYLES,
Of Counsel

2 copies rec'd
Haight Gardner
Nov 22, 1976, 3:30 PM